

WORKING DRAFT -- FOR DISCUSSION PURPOSES ONLY

INSTREAM WATER FLOW AMENDMENTS

LONG TITLE

General Description:

This bill makes changes related to change applications for certain uses of water.

Highlighted Provisions:

This bill:

- defines terms;
- provides that certain entities or individuals may file a change application to provide water for an instream flow or for use on sovereign lands;
- amends the process by which a change application for instream flow or use on sovereign lands is considered; and
- makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

List of sections affected:

AMENDS:

73-3-3

73-3-30

Statutory text:

73-3-3. Changes to a water right.

(1) For purposes of this section:

(a) "Change" means a change to the:

- (i) point of diversion;
- (ii) place of use;
- (iii) period of use;
- (iv) nature of use; or
- (v) storage of water.

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- 31 (b) "Fixed time change" means a change for a fixed period of time exceeding one
32 year and not exceeding 10 years, including a fixed time change described in
33 Section 73-3-30.
- 34 (c) "Permanent change" means a change, for an indefinite period of time, including
35 a permanent change described in Section 73-3-30.
- 36 (d) "Person entitled to the use of water" means:
- 37 (i) the holder of an approved but unperfected application to appropriate
38 water;
- 39 (ii) the record owner of a perfected water right;
- 40 (iii) a person who has written authorization from a person described in
41 Subsection (1)(d)(i) or (ii) to file a change application on that person's
42 behalf; or
- 43 (iv) a shareholder in a water company who is authorized to file a change
44 application in accordance with Section 73-3-3.5.
- 45 (e) (i) "Quantity impairment" means any reduction in the amount of water a
46 person is able to receive in order to satisfy an existing right to the use of
47 water that would result from an action proposed in a change application,
48 including:
- 49 (A) diminishing the quantity of water in the source of supply for the
50 existing right;
- 51 (B) a change in the timing of availability of water from the source of
52 supply for the existing right; or
- 53 (C) enlarging the quantity of water depleted by the nature of the
54 proposed use when compared with the nature of the currently
55 approved use.
- 56 (ii) "Quantity impairment" does not mean a decrease in the static level of
57 water in an underground basin or aquifer that would result from an action
58 proposed to be taken in a change application, if the volume of water
59 necessary to satisfy an existing right otherwise remains reasonably
60 available.
- 61 (f) "Split season change" means a change when the holder of a perfected right
62 grants to a water user the right to make sequential use of a portion of the water

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right.

(g) "Temporary change" means a change for a period of time, not exceeding one year, including a temporary change described in Section 73-3-30.

(2) (a) A person who proposes to file a change application may request consultation with the state engineer, or the state engineer's designee, before filing the application to review the requirements of the change application process, discuss potential issues related to the change, and provide the applicant with information.

(b) Statements made and information presented in the consultation are not binding on the applicant or the state engineer.

(c) The consultation described in Subsection (2)(a) may occur in the state engineer's regional office for the region where the proposed change would occur.

(3) (a) A person entitled to the use of water may make a change to an existing right to use water, including a right involved in a general determination of rights or other suit, if:

(i) the person makes the change in accordance with this section;

(ii) except as provided by Section 73-3-30, the change does not impair an existing right without just compensation or adequate mitigation; and

(iii) the state engineer approves the change application, consistent with Section 73-3-8.

(b) A change application on a federal reclamation project water right shall be signed by:

(i) the local water users organization that is contractually responsible for:

(A) the operation and maintenance of the project; or

(B) the repayment of project costs; and

(ii) the record owner of the water right.

(c) A change application on a United States Indian Irrigation Service water right that is serving the needs of a township or municipality shall be signed by:

(i) the local public water supplier that is responsible for the operation and maintenance of the public water supply system; and

(ii) the record owner of the water right.

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- 95 (4) (a) Before making a change, a person entitled to the use of water shall submit a
96 change application upon forms furnished by the state engineer.
- 97 (b) The application described in Subsection (4)(a) shall include:
- 98 (i) the applicant's name;
- 99 (ii) the water right description, including the water right number;
- 100 (iii) the water quantity;
- 101 (iv) the stream or water source;
- 102 (v) if applicable, the point on the stream or water source where the water is
103 diverted;
- 104 (vi) if applicable, the point to which it is proposed to change the diversion of
105 the water;
- 106 (vii) the place, nature, period, and extent of the currently approved use;
- 107 (viii) the place, nature, period, and extent of the proposed use;
- 108 (ix) if the change applicant is submitting a change application in accordance
109 with Section 73-3-3.5, the information required by Section 73-3-3.5;
- 110 (x) any proposed change to the storage of water; and
- 111 (xi) any other information that the state engineer requires.
- 112 (c) A shareholder in a water company who seeks to make a change to a water right
113 to which the water company is the record owner shall file a change application
114 in accordance with Section 73-3-3.5.
- 115 (5) In a proceeding before the state engineer, the applicant has the burden of producing
116 evidence sufficient to support a reasonable belief that the change can be made in
117 compliance with this section and Section 73-3-8, including evidence:
- 118 (a) that the change will not cause a specific existing right to experience quantity
119 impairment; or
- 120 (b) if applicable, rebutting the presumption of quantity impairment described in
121 Subsection 73-3-8(6)(c).
- 122 (6) A change of an approved application to appropriate water does not:
- 123 (a) affect the priority of the original application to appropriate water; or
- 124 (b) extend the time period within which the construction of work is to begin or be
125 completed.
- 126 (7) Any person who makes a change without first filing and obtaining approval of a

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change application providing for the change:

- (a) obtains no right by the change;
 - (b) is guilty of an offense punishable under Section 73-2-27 if the change is made knowingly or intentionally; and
 - (c) shall comply with the change application process.
- (8) (a) This section does not apply to the replacement of an existing well by a new well drilled within a radius of 150 feet from the point of diversion of the existing well.
- (b) A replacement well must be drilled in accordance with the requirements of Section 73-3-28.

73-3-30. Change application for [an] instream flow or sovereign lands.

(1) As used in this section:

- (a) "Division" means the Division of Wildlife Resources~~[:]~~ created in Section 23-14-1, ~~[or]~~ the Division of State Parks~~[:]~~ created in Section 79-4-201, or the Division of Forestry, Fire and State Lands created in Section 65A-1-4.

~~[(b) "Fishing group" means an organization that:~~

~~(i) is exempt from taxation under Section 501(c)(3), Internal Revenue Code;~~

~~and~~

~~(ii) promotes fishing opportunities in the state.]~~

(b) "Person entitled to the use of water" means the same as that term is defined in Section 73-3-1.

(c) "Sovereign lands" means the same as that term is defined in Section 65A-1-1.

(d) "Wildlife" means species of animals including, but not limited to, mammals, birds, fish, reptiles, amphibians, mollusks, and crustaceans, that are defined as "wildlife" and are protected or regulated by a statute, law, regulation, ordinance, or administrative rule.

- (2) (a) ~~[A division may file a change application, as provided by]~~ Pursuant to Section 73-3-3, a division may file a permanent change application, a fixed time change application, or a temporary change application, or a person entitled to the use of water may file a fixed time change application or a temporary change application to provide water ~~[for the purpose of providing water for an instream flow, within a specified section of a natural or altered stream channel, necessary]~~ within the state for:

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(i) an instream flow within a specified section of a natural or altered stream channel; or

(ii) use on sovereign lands.

(b) A change application filed under this section shall be necessary for:

(i) the propagation or maintenance of [fish] wildlife;

(ii) public recreation; or

(iii) the reasonable preservation or enhancement of the natural [stream] environment.

[(b)] (c) A division may file a change application on:

(i) a perfected water right:

(A) presently owned by the division;

(B) purchased by the division for the purpose of providing water for [an instream flow] a purpose described in Subsection (2)(a),

through funding provided for that purpose by legislative appropriation; or

(C) [acquired] secured by lease, agreement, gift, exchange, or contribution; or

(ii) an appurtenant water right acquired with the acquisition of real property by the division.

[(c)] (d) A division may:

(i) purchase a water right for the purposes [provided] described in [Subsection (2)(a)] Subsection (2)(a) only with funds specifically appropriated by the Legislature for water rights purchases; or

(ii) accept a donated water right without legislative approval.

[(d)] (e) A division may not acquire water rights by eminent domain for [an instream flow] a purpose described in Subsection (2)(a) or for any other purpose.

(3) [(a) A fishing group may file a fixed time change application on a perfected, consumptive water right for the purpose of providing water for an instream flow, within a specified section of a natural or altered stream channel, to protect or restore habitat for three native trout:

(i) the Bonneville cutthroat;

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191 ~~_____ (ii) _____ the Colorado River cutthroat; or~~

192 ~~_____ (iii) _____ the Yellowstone cutthroat.]~~

193 ~~[(b) _____ Before filing an application authorized by Subsection (3)(a) to change a~~
194 ~~shareholder's proportionate share of water, the water company shall submit the~~
195 ~~decision to approve or deny the change request required by Subsection~~
196 ~~73-3-3.5(3) to a vote of the shareholders:~~

197 ~~_____ (i) _____ in a manner outlined in the water company's articles of incorporation or~~
198 ~~bylaws;~~

199 ~~_____ (ii) _____ at an annual or regular meeting described in Section 16-6a-701; or~~

200 ~~_____ (iii) _____ at a special meeting convened under Section 16-6a-702.]~~

201 ~~[(c) _____ The specified section of the natural or altered stream channel for the instream~~
202 ~~flow may not be further upstream than the water right's original point of~~
203 ~~diversion nor extend further downstream than the next physical point of~~
204 ~~diversion made by another person.]~~

205 ~~[(d)]~~ (a) ~~[The fishing group]~~ A person entitled to the use of water shall receive[
206 ~~the Division of Wildlife Resources']~~ a division director's approval of the
207 proposed change before filing ~~[the]~~ a fixed time change application or a
208 temporary change application with the state engineer.

209 (b) By approving a proposed fixed time change application or temporary change
210 application, a division director attests that the water that is the subject of the application can
211 be used consistent with the statutory mandates of the director's division.

212 ~~[(e) _____ The director of the Division of Wildlife Resources may approve a proposed~~
213 ~~change if:~~

214 ~~_____ (i) _____ the specified section of the stream channel is historic or current habitat~~
215 ~~for a species listed in Subsections (3)(a)(i) through (iii);~~

216 ~~_____ (ii) _____ the proposed purpose of use is consistent with an existing state~~
217 ~~management or recovery plan for that species; and~~

218 ~~_____ (iii) _____ the fishing group has:~~

219 ~~_____ (A) _____ entered into a programmatic Candidate Conservation Agreement~~
220 ~~with Assurances with the United States Fish and Wildlife Service;~~
221 ~~as authorized by 16 U.S.C. Secs. 1531(a)(5) and 1536(a)(1), that~~
222 ~~gives the water right holder the option to receive an enhancement~~

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~~of survival permit, as authorized by 16 U.S.C. Sec. 1539(a)(1)(A),
or a certificate of inclusion, for a fixed time change application that
benefits a candidate species of trout; or~~

~~(B) until a programmatic Candidate Conservation Agreement with
Assurances described in Subsection (3)(e)(iii)(A) becomes valid
and enforceable, entered into a contract with the water right
holder agreeing to defend and indemnify the water right holder for
liability under Section 1538(a) of the Endangered Species Act, 16
U.S.C. Secs. 1531 through 1544, for an action taken by the water
right holder under the terms of the water right holder's agreement
with the fishing group for a fixed time change application.~~

~~(f) The director may deny a proposed change if the proposed change would not be
in the public's interest.~~

~~(g) (i) In considering a fixed time change application, the state engineer shall
follow the same procedures as provided in this title for an application to
appropriate water.~~

~~(ii) The rights and the duties of a fixed time change applicant are the same
as provided in this title for an applicant to appropriate water.~~

~~(h) A fishing group may refile a fixed time change application by filing a written
request with the state engineer no later than 60 days before the application
expires.~~

~~(i) (i) The water right for which the state engineer has approved a fixed time
change application will automatically revert to the point of diversion and
place and purpose of use that existed before the approved fixed time
change application when the fixed time change application expires or is
terminated.~~

~~(ii) The applicant shall give written notice to the state engineer and the
lessor, if applicable, if the applicant wishes to terminate a fixed time
change application before the fixed time change application expires.]~~

(4) In addition to the requirements of Section 73-3-3, an application authorized by this
section shall:

(a) ~~[set forth the]~~ include a legal description of:

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- 255 (i) the ~~[points on the]~~ segment of a natural or altered stream channel ~~[between~~
256 ~~which the instream flow will be provided by the change application]~~ that will be the place of
257 use for an instream flow; [and] or
258 (ii) the applicable place of use where the water will be used on sovereign lands;
259 and
- 260 (b) include appropriate studies, reports, or other information required by the state
261 engineer demonstrating ~~[the necessity for the instream flow in the specified~~
262 ~~section of the stream and]~~ the projected benefits to the public resulting from the
263 change~~[-]~~ and:
- 264 (i) the necessity for the instream flow in the specified section of the natural or
265 altered stream channel; or
266 (ii) the necessity for the use where the water will be used on sovereign lands.
- 267 ~~[(5) (a) For a permanent change application or a fixed time change application filed~~
268 ~~according to this section, 60 days before the date on which proof of change for~~
269 ~~an instream flow is due, the state engineer shall notify the applicant by mail or~~
270 ~~by any form of communication through which receipt is verifiable of the date~~
271 ~~when proof of change is due:~~
- 272 ~~_____ (b) Before the date when proof of change is due, the applicant must either:~~
- 273 ~~_____ (i) file a verified statement with the state engineer that the instream flow~~
274 ~~uses have been perfected, setting forth:~~
- 275 ~~_____ (A) the legal description of the points on the stream channel between~~
276 ~~which the instream flow is provided;~~
- 277 ~~_____ (B) detailed measurements of the flow of water in second-feet~~
278 ~~changed;~~
- 279 ~~_____ (C) the period of use; and~~
- 280 ~~_____ (D) any additional information required by the state engineer; or~~
- 281 ~~_____ (ii) apply for a further extension of time as provided for in Section 73-3-12.~~
- 282 ~~_____ (c) (i) Upon acceptance of the verified statement required under Subsection~~
283 ~~(5)(b)(i), the state engineer shall issue a certificate of change for~~
284 ~~instream flow use in accordance with Section 73-3-17.~~
- 285 ~~_____ (ii) The certificate expires at the same time the fixed time change~~
286 ~~application expires.]~~

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287 ~~[(6)]~~ (5) A person may not appropriate unappropriated water under Section 73-3-2 for
288 the ~~[purpose of providing an instream flow]~~ purposes described in Subsection
289 (2)(a).

290 ~~[(7)]~~ (6) Water used in accordance with this section is considered to be beneficially
291 used, as required by Section 73-3-1.

292 ~~[(8)]~~ (7) A physical structure or physical diversion from the stream is not required to
293 implement a change ~~[for instream flow use]~~ application under this section.

294 ~~[(9)]~~ ~~This section does not allow enlargement of the water right that the applicant seeks to~~
295 ~~change.~~

296 ~~[(10)]~~ ~~A change application authorized by this section may not impair a vested water right,~~
297 ~~including a water right used to generate hydroelectric power.~~

298 ~~[(11)]~~ ~~The state engineer or the water commissioner shall distribute water under an~~
299 ~~approved or a certificated instream flow change application according to the change~~
300 ~~application's priority date relative to the other water rights located within the stream~~
301 ~~section specified in the change application for instream flow.] _~~

302 ~~[(12)]~~ (8) ~~[An approved fixed time]~~ A change application approved under this section
303 does not create a right of access across private property or allow any
304 infringement of a private property right.